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No. 83-253

In the Supreme Court of the United States

OCTOBER TERM, 1983

CESAR MOYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's encounter with law enforcement officers at an airport constituted an unlawful seizure.

2. Whether the police detention of a shoulder bag for a dog "sniff test" exceeded the permissible duration of an investigative detention of personal effects.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 704 F.2d 337. The opinion of the district court (Pet. App. A6-A27) is reported at 561 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on March 22, 1983. A petition for rehearing was denied on June 16, 1983 (Pet. App. A5). The petition for a writ of certiorari was filed on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of cocaine with intent to distribute,

in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment to be followed by a four-year special parole term. The court of appeals affirmed. Pet. App. 1-18.

1. As set forth in the decisions of the courts below (Pet. App. 2-4, A6-A9), evidence presented during a suppression hearing showed that on March 20, 1980, a DEA agent and a Chicago police officer on duty at Chicago's O'Hare Airport observed petitioner deplane from a flight from Miami, Florida, carrying a shoulder bag. After deplaning, petitioner walked across the concourse, surveyed the crowd, and then proceeded toward the main terminal, periodically looking backward over his shoulder. En route, he twice entered restrooms, but did not use the toilet. He then proceeded to the arrival area of the terminal and, without retrieving any additional luggage, entered a taxi line. Pet. App. 2-3, 11, A6-A7.

Their suspicions aroused by petitioner's behavior, the officers approached him, identified themselves, and asked for permission to speak with him. When petitioner agreed, they requested that he display some identification, but he stated that he did not have any. The officers then asked if petitioner would agree to return to the terminal building in order to avoid the night chill and the pedestrian traffic. Petitioner assented and, once inside the foyer, the questioning resumed. After petitioner identified himself and complied with a request to allow the officers to examine his ticket, he was once again asked for identification. When he asked "what this was all about," the officers disregarded the inquiry and repeated their request.[1] Petitioner then reached into a side pocket of his shoulder bag and produced his

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[1]Petitioner testified that at this point he asked to leave but that the officers would not permit him to do so. One of the officers denied this. The district court resolved the factual dispute in favor of the officer's testimony (Pet. App. A13).

driver's license. As he did so, the DEA agent observed the corner of a clear plastic bag in the pocket. When the agent asked him to produce the bag, however, petitioner denied that it existed. Pet. App. 3, A7-A8.

After the agent threatened to remove it himself, petitioner surrendered the bag, which contained several other clear bags, some small bottles, and several small spoons. The officers recognized these items as drug paraphernalia, and they asked petitioner's consent to a search of the shoulder bag. When he refused, they detained the bag in order to summon a drug detecting dog and, if necessary, to attempt to obtain a search warrant. Petitioner, however, was permitted to leave after the officers took his photograph. The officers contacted the Customs Office and, after about three hours, a trained dog arrived and alerted on petitioner's bag after examining it in a lineup with six similar bags. Following the issuance of a warrant, a search of the bag revealed more than 500 grams of cocaine, valued at between $40,000 and $50,000. Pet. App. 3-4, A8-A9.

2. The district court denied petitioner's motion to suppress (Pet. App. A6-A27). The court found that the encounter with the officers did not constitute an unlawful seizure and that the ensuing detention of the bag was lawful. Observing that "the undisputed testimony shows that [the officers] did not engage in any show of force in approaching [petitioner], that they did not lay hands on him at any time, and that [petitioner] showed no hesitancy in agreeing to respond to their questions or in agreeing to remove himself from the taxi line and enter the terminal foyer," the court held that "no constitutionally cognizable seizure can be said to have taken place" (*id.* at A13-A14).

The district court also found that the events that developed during the course of the interview justified a reasonable belief that petitioner's shoulder bag contained contraband. The court did state that the seizure of the small plastic

bag observed by the agent when petitioner produced his identification constituted "an unconstitutional warrantless search" (Pet. App. A21) because the bag was produced at the compulsion of the officers. But the court held that the subsequent seizure of the shoulder bag was untainted because the officers "had previously accumulated in a lawful manner sufficient knowledge to justify the bag's detention" (*id.* at A26).

The court of appeals affirmed (Pet. App. 1-18). The court upheld the district court's determination that petitioner's freedom to leave was not restrained by an overbearing show of authority and therefore that no constitutionally cognizable seizure had occurred (*id.* at 5-8). The court also agreed with the district court's finding that, even before the officers seized the plastic bag, they possessed reasonable suspicion that the shoulder bag contained contraband (*id.* at 9-11). Relying on *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the court therefore concluded that the officers were permitted to detain the shoulder bag temporarily for further investigation (Pet. App. 8).

Judge Swygert dissented (Pet. App. 12-18). In his view, by the time the officers noticed the plastic bag, the encounter had risen to the level of an unconsented seizure that was not supported by reasonable suspicion.

DISCUSSION

1. Petitioner contends (Pet. 6-9) that his encounter with law enforcement officers at O'Hare Airport constituted an unlawful seizure. This fact-bound question was resolved against petitioner by both courts below, and there is no occasion for this Court to review it.

a. The governing principle is well settled:

> "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the

> officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred".

United States v. *Mendenhall*, 446 U.S. 544, 552 (1980) (opinion of Stewart, J.) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968)). See also *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5 (plurality opinion); *Reid* v. *Georgia*, 448 U.S. 438, 440 n.* (1980). In *Mendenhall*, Justice Stewart explained (446 U.S. at 554 (footnote omitted)):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

In this case, as the district court observed (Pet. App. A13), the undisputed testimony establishes that the law enforcement officers did not engage in any show of force in approaching petitioner, that they did not lay their hands on him at any time, and that petitioner showed no hesitancy in agreeing to respond to their questions and to return to the terminal in order to avoid the weather and pedestrian traffic. The court also noted (*id.* at A13 n.5) that petitioner did not feel compelled to comply with all of the officers' requests and that they did not insist that he do so. For example, petitioner testified that he refused to grant the officers' request to inspect his boots and that they honored the refusal. Under these circumstances, both courts below correctly concluded that "no constitutional seizure of

[petitioner's] person occurred in the case" (*id.* at A18; see *id.* at 6-7).[2]

b. Even assuming that the consensual encounter with law enforcement authorities ripened into a seizure by the time the officers discovered the drug paraphernalia in the clear plastic bag and then seized petitioner's travel bag, the officers at that time had a reasonable suspicion that petitioner was carrying contraband that justified a brief investigatory detention of both his person and the bag. See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5-6; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879-883 (1975); *Terry* v. *Ohio*, 392 U.S. at 20-22. As the court below observed (Pet. App. 11), by the time the bag was seized the officers' curiosity had been aroused by petitioner's apparent efforts to detect surveillance upon deplaning, his entry into two restrooms without using the facilities in either one and, after a further survey of the terminal area, his rapid departure carrying only a shoulder bag. These suspicions were significantly heightened when petitioner lied about possessing either any identification or the plastic bag noticed by the officers. In view of all of these factors, the agents had reasonable grounds for suspecting that petitioner was carrying contraband that justified an investigative detention to enable them to verify or dispel their suspicion.

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[2]The correctness of this conclusion is reinforced, not undermined, by the decision in *Florida* v. *Royer*, *supra* (see Pet. 8, 10). The plurality in *Royer* noted that consensual encounters between law enforcement officers and members of the public that involve questioning do not necessarily constitute seizures for Fourth Amendment purposes (slip op. 5-6). True, the plurality concluded on the facts of that case that the encounter ripened into a seizure when the police officers asked Royer to accompany them to a police office while maintaining custody of his driver's license and ticket and without informing him that he was free to leave (slip op. 11). But in this case, by contrast, the police merely asked petitioner to step into the terminal foyer to escape the night chill and took no action to impede his departure if he declined.

2. Petitioner also contends (Pet. 9-10) that the three-hour detention of his shoulder bag exceeded the scope of an allowable investigative seizure. Relying upon *United States* v. *Klein*, 626 F.2d 22, 25-26 (7th Cir. 1980), both the district court and the court of appeals held that the detention in order to obtain a dog sniff was permissible on the basis of reasonable suspicion. Subsequent to the decision below, this Court held in *United States* v. *Place*, No. 81-1617 (June 20, 1983), that the 90-minute detention there of the defendant's luggage for the purpose of arranging a dog sniff exceeded the limits of a permissible investigative stop. That decision, which the court of appeals had no opportunity to consider,[3] is clearly relevant to a determination of the reasonableness of the duration of the seizure in this case, and therefore it is appropriate for this Court to vacate the decision below and remand the case to the court of appeals for reconsideration in light of *Place*.[4]

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[3]The court of appeals declined to follow the Second Circuit's decision in *Place*, 660 F.2d 44 (1981), because of its own controlling precedent in *Klein*. See Pet. App. 8-9 n.2.

[4]Because it was unnecessary to its decision, the court below did not address the question whether the agents possessed probable cause to believe that the shoulder bag contained contraband when it was seized. If there were probable cause, notwithstanding *Place*, a seizure of the shoulder bag pending the arrival of a search warrant would have been permissible. See, *e.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979). The probable cause issue, of course, remains open on remand. In addition, it is our submission that any Fourth Amendment violation that may have occured here was at worst the product of a reasonable mistake about the applicable legal principles. If this Court recognizes a "reasonable mistake" exception to the exclusionary rule (*e.g.*, *Colorado* v. *Quintero*, cert. granted, No. 82-1711, (June 27, 1983), suppression of the evidence in this case would be inappropriate. This question as well can be considered by the court of appeals on remand.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for reconsideration in light of *United States* v. *Place*, *supra*.

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